IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MILTON J. SHAPP,

Appellant,

against

UNITED STATES OF AMERICA, et al.

Appellees.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF MILTON J. SHAPP

This reply to the Motion to Affirm and Reply to the briefs of appellees is made pursuant to the October 18, 1966 *per curiam* opinion of this Court.

I. APPELLANT'S STANDING TO CHALLENGE THE MERGER

The briefs by the Interstate Commerce Commission, PRR-NYC and State of New York assert that Milton J. Shapp has no standing to challenge the merger in the Federal courts. However, no motion is made to dismiss his appeal, although motions to the jurisdictional statements were provided for by the *per curiam* opinion of the Court of October 18, 1966.

The question of appellant's standing is not properly before this Court for the further reason that it was not raised below. Appellant's motion for leave to intervene and to file his attached complaint was heard by the District Court on September 13, 1966, with all counsel present, and not a single voice was raised in opposition. The Commission and State of New York referred to the matters complained of by Milton J. Shapp in their briefs to the District Court without any hint of lack of standing, and counsel for the Commission discussed the Shapp contentions during

oral argument.

There is a substantial amount of legal literature on citizen suits and stockholder actions. A long and detailed legal argument herein is unnecessary. The Administrative Procedure Act requires that once a court acquires jurisdiction of an administrative determination, it shall review the whole record or such portions as may be cited by any party. (5 U.S.C. 1009(e)). This Court has determined to hear the case on the merits, and a reading of the Commission's two reports clearly shows that the matters raised by Milton J. Shapp are essential to a determination of the validity of the Commission's orders.*

II. THE UNJUSTIFIABLE RELIANCE UPON THE NEW YORK CENTRAL SECURITIES CORPORATION TEST

Appellees place strong reliance upon the "public interest" as defined by this Court in *New York Central Securities Corp.* v. *United States*, 287 U.S. 12 (1932). That definition in turn was predicated upon the inferred policy underlying the Transporation Act of 1920 as determined by way of construction in *New England Divisions Case*, 261 U.S. 184 (1923).

PRR and NYC flatly state that the term "public interest" in the present Section 5(2)(b) is that defined in 1932 in *New York Central Securities Corp.* (PRR-NYC Br., pp. 68-69) The Commission argues that there is no substantial difference between the term "public interest" used in the 1920 Act and the same term as used in the 1940 Act. (I.C.C. Br., p. 89)

This error goes to the fundamental validity of the merger. The issue is substantial and a resolution by the court now will affect many pending rail unification proceedings.

Until 1940 the governing standard for a railroad merger was that it "promote the public interest," and the

*Although the Commission terms the challenges of Shapp and Scranton as "flimsy," many of the matters raised by these appeals may be found in the brief of the United States to the Commission dated June 1, 1964.

four criteria of *New York Central Securities Corp.* defined the public interest. The Transportation Act of 1940, however, made significant changes in the railroad merger provisions of the Act. The words "promote the public interest" were changed to "consistent with the public interest." Four specific criteria were enacted into Section 5(2)(c), one of which, adequacy of service, was also one of the four criteria in *New York Central Securities Corp.* The other three criteria are significantly different. Furthermore, Section 5(2)(c) is not limited to four criteria beeause the listing in new Section 5(2)(c) says "among others," The Transportation Act of 1940 also enacted a National Transportation Policy, which by its terms is read into the "public interest" proviso of Section 5(2).

The relaxation of the railroad consolidation provisions in 1940, principally repeal of the requirement that mergers conform to an overall plan, gave rise to the controversy decided in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944). It was an activist approach to the NTP that permitted the Court to reach the antitrust conclusion made in that opinion. Even the dissenting expression of Justice Douglas conoeded that the public interest embraces the NTP.

The *McLean* opinion holds that the NTP is read into the "public interest" and the policy of the antitrust legislation is one of the "among others" of Section 5(2)(c) to be given weight in passing upon a transaction. Appellant submits that the "public interest" cannot be a fixed and unalterable concept as now suggested by the Commission and PRR-NYC. *McLean* also refers to the Interstate Commerce Act and other legislation dealing with transportation (321 U.S. at pp. 79-80). The Act is continually being amended in keeping with new requirements; other significant legislation, specifically dealing with transportation problems, is being continuously enacted. Yet the concept urged by the Commission is geared to the year 1920.

The limited definition of the public interest made in *New York Central Securities Corp.* is out of date. The

public interest today is defined by the four enumerated criteria of Section 5(2)(c), among others, and therefore includes the policy of the antitrust laws, and the policy of statutes specifically dealing with transportation facilities and problems. Of course the criteria named in the NTP cannot be disregarded in determining the public interest.

III. THE EFFECT OF RECENT LEGISLATION ON THE PUBLIC INTEREST

Recent legislation affecting this proceeding includes (1) the passenger train discontinuance law enacted as part of Transportation Act of 1958 and (2) statutes directed to employment and the rehabilitation of communities.

A. *New Haven Inclusion.* The Congressional policy of the 1958 Act is being defeated by the attempted inclusion of the New Haven Railroad. The New England states of Connecticut, Massachusetts and Rhode Island say they are spending a vast sum of money to support the New Haven railroad, which funds are being diverted from other services which the states help support, and that the longer the merger is delayed, the longer these payments must continue. (NE Br., p. 12) On the other hand, the Commission argues that inclusion of the New Haven passenger deficit operations, if undue, need not be borne by any savings from the merger. (I.C.C. Br., p. 91)

The reports of the Commission together with its concurrent opinion in *N.Y., N.H. & H.R. Co., Discontinuance of all Interstate Passenger Trains,* 327 I.C.C. 151, clearly indicate that the PRR-NYC merger is to be the viable medium for preservation of rail capacity in New Haven territory. (See: 327 I.C.C. at p. 173)

The Trustees of the New Haven and PRR-NYC reached an agreement for the merged company to assume only freight operations. (327 I.C.C. at p. 175) A solution for the New Haven was thus available. Yet the New England States and the Commission claimed that such was not in the public interest. Quite obviously, therefore, inclusion of N.H. passenger service in the merger is seen

as a device to have other areas served by PRR and NYC subsidize the affluent N.H. passengers, apart from any reorganization problems of its Trustees.

This purpose of the proposed merger, without which it would be disapproved, thus runs counter to the Congressional policy behind the 1958 amendment. Indeed, it is also inconsistent with the 1940 legislative purposes.

B. *Other Recent Legislation Affecting Transportation.* The Commission and applicants assert that the agency need not consider certain legislation as part of the public interest.* (I.C.C. Br., p. 88; PRR-NYC Br., p. 70) In this manner they argue that the adverse impact of the merger upon communities may be ignored in many significant respects, particularly with regard to employment and the redevelopment of depressed areas. A reading of these statutes, however, indicates a strong directive that Congress intends the Commission to consider these matters, although the weight to be accorded will differ dependent upon the circumstances of a given proposed merger.

In a merger the size of the PRR-NYC, which serves 13 of the most populous states embracing the industrial heartland of the nation, the effect of economic impact must be considered. Since the 1944 decision in *McLean*, Congress has shown by numerous enactments that the federal government, as well as local and state governments, has an ever increasing obligation to the public to maintain and stimulate economic activity for all people in all regions. Since it is indisputable that transportation is essential to economic activity anywhere, it is an error of law for the Commission to disregard what has happened in America since 1920.

The Employment Act of 1946 states:

> ". . . it is the continuing policy and responsibility of the Federal Government . . . to promote maximum employment, production and purchasing power."

*Employment Act of 1946; Area Redevelopment Act of 1961; Manpower Development and Training Act of 1962; Economic Opportunity Act of 1964; Appalachian Regional Development Act of 1965.

The Area Redevelopment Act of 1961 provides:

"... that the maintenance of the national economy at a high level is vital to the best interests of the United States ... that Federal assistance to communities, industries, enterprises, and individuals in areas needing redevelopment should enable such areas to achieve lasting improvement and enhance the domestic prosperity by the establishment of stable and diversified local economies. ..."

The Appalachian Regional Development Act of 1965 specifically refers to that area's transportation problem:

"... It is, therefore, the purpose of this Act to assist the region in meeting its special problems, to promote its economic development, and to establish a framework for joint Federal and State efforts toward providing the basic facilities essential to its growth and attacking its common problems and meeting its common needs on a coordinated and concerted regional basis. ... As the region obtains the needed physical and transportation facilities and develops its human resources the Congress expects that the region will generate a divertified industry, and that the region will then be able to support itself, through the workings of a strengthened free enterprise economy."

Similar expressions establishing Congressional intent that all branches of federal government are to be concerned with impact of their activities upon the economic activity in communities and states, may also be found in the Manpower Development and Training Act of 1962, Economic Opportunity Act of 1964, and in the legislation creating the Department of Housing and Urban Development and the Department of Transportation.

The opinion of this Court in *McLean* directs that the Commission consider legislation other than the Interstate Commerce Act itself. (321 U.S. at pp. 79-80) Eighteen municipalities participated in *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959) to protect the impact of the merger upon their communities. The error of law of the Commission in refusing to consider the adverse

impact of the merger upon communities is readily apparent.

IV. MARKET COMPETITION SHOULD HAVE BEEN CONSIDERED BY THE COMMISSION

PRR and NYC argue that the Commission did consider market competition between PRR and NYC in appraising the competition which would be curtailed by the proposed merger. (PRR-NYC Br., pp. 73-74) However, contrary to this contention, there is nothing in the April 6, 1966 report refering to market competition, as distinguished from carrier or product competition. The Commission in its September 16, 1966 report on reconsideration maintained that its power to confer antitrust immunity relieved it from making the analysis of market competition which the agency has heretofore deemed essential. (328 I.C.C. at p. 309)

The failure to consider market competition is also apparent from the report of the hearing examiners. They stated that the only study of record which attempted to provide a realistic measure of competition between railroads was a study of competition between pairs of cities. (Rec. Rep., pp. 162-63) This is not market competition.

The two reports of the Commission would extend *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965), so as to relieve the Commission from the duty of making any analysis of competition in meaningful transportation terms. This is erroneous as a matter of law for the reasons set forth in appellant's brief. (No. 814, pp. 30-34; J.A., D6-7; E50-52)

V. REPLY TO COMMONWEALTH OF PENNSYLVANIA AND CITY OF PHILADELPHIA AND REPLY TO MOTION TO AFFIRM

Neither the Commonwealth of Pennsylvania nor the City of Philadelphia make any reference to the briefs submitted in Nos. 813 and 814. Both parties were in strong opposition to the merger before the Commission, but

neither elaborates now upon the rational behind the change in position.

In view of the extensive participation by these parties in the Commission proceedings as shown by the facts presented at the Commission, detailed in the examiners' report, their briefs to this Court with mere conclusive generalities unfortunately does not shed much light on the issues involved. The evidence as to the adverse impact of the proposed merger upon Pennsylvania is overwhelming, and the "finding" of the Commission to the contrary is patently erroneous and without evidentiary support necessary for its being sustained. (J.A., E80-83).

Greater Philadelphia Chamber of Commerce and Chamber of Commerce of Greater Pittsburgh move to affirm the judgment on the ground that the questions on which the decision depend are so unsubstantial as not to need further argument. The title page of the brief on behalf of the State of New York also states "Motion to Affirm," but the contents thereof do not disclose any motion on the jurisdictional statements.

The motion to affirm should be denied. The largest proposed merger in United States corporate history obviously involves many serious and substantial questions.

Respectfully submitted,

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